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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 732

CATHERINE JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 38-64) is unreported. The opinion of the court of appeals (Pet. App. 16-37) is reported at 414 F.2d 22.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1969. A petition for rehearing was denied on September 16, 1969. The petition for a writ of certiorari was filed on October 13, 1969. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution for perjury before a grand jury, it was prejudicial error to refuse to allow petitioner, who had been given a copy of her own testimony, pre-trial inspection of the grand jury testimony of prosecution witnesses as well.

2. Whether, in a prosecution based on specific allegations of perjury, the trial court properly exercised its discretion in refusing to provide the entire transcript of petitioner's grand jury testimony to the jury for use during its deliberations.

3. Whether pre-indictment statements made by petitioner, who was not in custody and who was warned of her rights to silence and to the assistance of counsel, were properly admitted into evidence at her perjury trial.

4. Whether petitioner, who had been granted immunity under the Federal Communications Act with respect to her grand jury testimony, was entitled to raise as a defense to a charge of perjury the contention that her false statements were not material to a possible violation of that statute.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of perjury in violation of 18 U.S.C. 1621. On September 28, 1967, she was sen-

tenced to imprisonment for a period of three years. The court of appeals affirmed.

On January 24, 1966, petitioner testified before a grand jury that, after a deputy marshal took her to the tenth floor of a hotel where the jurors had been sequestered during the Chattanooga trial of James R. Hoffa, she had sexual intercourse with two of the jurors. The grand jury at that time was investigating allegations made in affidavits supporting the third motion for a new trial in the Hoffa case (Tr. 299) that United States marshals had furnished prostitutes for some of the Hoffa case jurors while the jurors were sequestered in the hotel. See *United States* v. *Hoffa*, 382 F.2d 856, 861-862 (C.A. 6), certiorari denied, 390 U.S. 924. Petitioner was one of the affiants who said that she had been procured by the marshals.

At the instant trial, the two Hoffa case jurors denied any misconduct, testifying that the only time they had seen petitioner was during the grand jury proceedings (Tr. 285-286, 327-328). The deputy marshal also denied petitioner's accusation, stating that he first saw petitioner at her trial (Tr. 262-265). The government also introduced evidence of the strict security arrangements which had been established and followed by the marshals to keep the jury completely isolated on the top floor of the hotel where they were housed during the Hoffa trial (see, *e.g.*, Tr. 143-152).

An F.B.I. agent testified that he interviewed petitioner at the home of one of her friends in April 1966, about eleven months before the return of the indictment. He warned her of her rights to keep

silent and to consult an attorney (Tr. 306-309). Petitioner said she would not have testified as she did before the grand jury if it were not true; that she was sorry that she got "tied up to this thing," and that she was prepared to face the consequences of her actions. When informed that she could still correct any error in her statements, she replied that she knew about the penalties for perjury (Tr. 310-311).

ARGUMENT

1. Before trial, petitioner moved for pre-trial discovery of various documents and writings, including a transcript of the proceedings before the grand jury. Her motion specifically mentioned the grand jury testimony of the two jurors with whom she had said she had sexual relations. The district court provided her with a copy of her own grand jury testimony, but declined to turn over, prior to trial, any other portions of the grand jury proceedings. The court stated that disclosure of testimony "may properly be obtained only upon a showing of 'particularized need' and then in a manner consistent with the Jencks Act" (Pet. App. 26-27; see Pet. App. 47-48). At trial, after the two jurors testified, no request was made by petitioner for the transcript of their grand jury testimony.

The courts below properly held that petitioner had made no showing of any "particularized need" for the grand jury testimony of the two witnesses., *E.g.*, *United States* v. *Procter & Gamble*, 356 U.S. 677, 683. There is, indeed, a serious question as to the extent to which grand jury testimony (other than that of the defendant) is subject at all to pre-trial

discovery. See *United States, et al.* v. *Gifford-Hill-American, Inc.*, No. 515, this Term, in which the government has filed a petition for a writ of certiorari to review a ruling of the Court of Appeals for the Fifth Circuit (413 F.2d 1244) that such minutes are subject to discovery under Rule 16(b), F. R. Crim. P. No court has, however, held that pre-trial discovery is available as a matter of course without showing a need for such testimony.[1] *Dennis* v. *United States*, 384 U.S. 855, and decisions stemming therefrom, on which petitioner (Pet. 8-9) and the court of appeals' dissent (Pet. App. 33-35) seek to rely, relate to the production of minutes after a witness has testified at trial, and are thus inapposite here.

In short, petitioner has never made a showing as to how testimony by the Hoffa jurors denying her accusations (a denial implicit in the return of the indictment) could possibly have aided in the preparation of her defense. And, as noted above, no request was ever made at trial for production of their grand jury testimony for possible use in attempting to impeach those witnesses.

2. The transcript of proceedings involving petitioner's appearance before the grand jury was received into evidence without objection as Government Exhibit 2 (Tr. 130). As noted by the district court, the first 41 pages of the 372-page transcript contained

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[1] See *James* v. *United States*, decided by the Fifth Circuit (No. 26162) on September 17, 1969, and presently pending on petition for a writ of certiorari, No. 746, this Term, in which its earlier decision is interpreted as having been based on a showing of particularized need.

the refusal of petitioner to answer questions on self-incrimination grounds, and pages 42 through 130 were the record of the proceedings under which she was granted immunity (Pet. App. 59-60).

During the trial, government counsel read the portion of the transcript in which petitioner had testified that she had sexual relations with jurors Link and Curbow on the tenth floor of the hotel after a deputy marshal had brought her there (Tr. 131-137). In closing argument, defense counsel read a portion of the transcript in which petitioner had testified that she also had relations with juror Bonner. The defense argued that since the government did not prosecute petitioner with respect to her testimony concerning Bonner, it knew that her testimony was true (Tr. 562-565). The government, in response, referred to other grand jury testimony of petitioner in which she stated that she did not remember whether she had relations with Bonner (Tr. 584). The government also read petitioner's testimony in which she had testified that a bellboy, one Seymour Ball, had called her to come to the hotel; that she had met him on the eighth floor and that he had introduced her to the marshal; that subsequently the marshal walked her back to the eighth floor where she met Ball who gave her $20 and led her out. The government pointed out that Seymour Ball had not testified at the trial (Tr. 586-590).

Before the jury retired for its deliberations, the trial court, in response to a defense request that the jury be permitted to take Government Exhibit 2 with it, advised the jury that it would not require it to

take any portion of the record, but that "it will be up to the jury as to what their request may be in that respect" (Tr. 611). Subsequently, there was communicated to the judge a request by a juror for the testimony of petitioner before the grand jury (Tr. 621). The judge called the jury back and informed them that the request should be in writing. The foreman stated that "one of the gentlemen has requested the copy of the testimony of the defendant given to the grand jury"; the court reserved a ruling on the request (Tr. 622-623).

Outside the presence of the jury, the trial judge expressed the opinion that the portion of the testimony which was read into the record during trial would be proper for submission to the jury, but not other portions of the transcript. He said that if the reporter would provide the court with the portion read into evidence, this would be made available to the jury (Tr. 624). Defense counsel noted the fact that both he and government counsel had referred to portions of the transcript in their argument (Tr. 625). The court, however, took the position that matters not read into the record were not presented to the jury and thus did not constitute matters they could properly consider (Tr. 626, 630). Subsequently, the jury submitted a written request for petitioner's "deposition" (Tr. 635). When called back by the court, to clarify their request, the foreman stated they "would like to have that part of the information as to how she got in and out of the tenth floor" (Tr. 641). Defense counsel took the position that the entire transcript should be made available

(Tr. 647). The court decided not to comply with the request (Tr. 647). It had already told the jury to consider "only the evidence that was introduced to the jury for consideration by the jury" (Tr. 641).

The trial judge was clearly justified in not submitting the entire transcript to the jury, even though it had formally been introduced into evidence as an exhibit. That it contained irrelevant material is manifested by the fact that both sides referred to only small portions of the 372-page document. The judge could legitimately feel that the jury should not be encouraged to consider material, much of it wholly irrelevant to the perjury prosecution, on which neither counsel had seen fit to elucidate. It may have been erroneous to receive the entire transcript in evidence without specification of the relevant portions, but the judge properly minimized that error, and indeed rendered it harmless, by not sending the whole document to the jury. Insofar as the final communication narrowed the request to a portion of the transcript read by the prosecutor in summation, but not introduced in evidence, petitioner is hardly in a position to complain that the elimination of this material from the jury's consideration was prejudicial to her. The judge made it clear to the jury that they were to consider only the matters actually read into the record during the trial. The issue in the case did not turn on any particular answer to a specific question, but rather on the broad question whether petitioner had lied when she told the grand jury that she had sexual relations with two of the jurors (Tr. 120, 551).

3. Petitioner's statement to the F.B.I. agent was properly received in evidence. Although she was not in custody at the time, she was fully warned of her rights to silence and to consult an attorney. Since petitioner was not under indictment at the time, it was not improper for the government agent to speak with her. Unlike the situation in *Massiah* v. *United States*, 377 U.S. 201, upon which petitioner relies (Pet. 12), there was neither a surreptitious interview after indictment or a denial of the right to consult with counsel in the instant case.

4. Petitioner argues that, since she was granted immunity under the Federal Communications Act (47 U.S.C. 409 (*l*)), she cannot be prosecuted for giving false testimony as to matters not relevant to a violation of the Communications Act. This contention is unsound. The immunity which petitioner required was not limited to immunity from prosecution under the Communications Act, but was a complete immunity from all prosecution related to her testimony. Her obligation was thus to testify truthfully before the grand jury as to any matter relevant to its inquiry. The test of materiality is whether the false testimony is capable of influencing any part of the investigation of the grand jury. See *Barnes* v. *United States*, 378 F. 2d 646, 649 (C.A. 5), certiorari denied, 389 U.S. 917.

The argument that petitioner was illegally compelled to testify before the grand jury was properly rejected by the district court prior to her appearance at the grand jury proceedings. The court found that the grand jury was engaged, *inter alia*, in a good

faith investigation to determine whether the Communications Act had been violated, and also found that petitioner would be immune from prosecution if she answered the questions propounded by the grand jury honestly. If petitioner thought that the court was wrong in its ruling, she could have, like any other witness who claims a privilege not to answer, tested this refusal in a contempt proceeding. See, *e.g.*, *In re Grand Jury Investigation of Giancana*, 352 F. 2d 921 (C.A. 7), certiorari denied, 382 U.S. 959. In no event, as the court below found, did petitioner have a license to commit perjury. See generally the government's brief in *United States* v. *Knox*, No. 17, this Term.[2]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be denied.

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NOVEMBER 1969.

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[2] The speculative statement in the dissent that the grant of immunity was a procedural device "to obtain cross-examination of this young woman before formal accusation of her would foreclose such activity" (Pet. App. 30), is unfounded. The grand jury was properly investigating all the circumstances and persons involved in obtaining the false affidavit. Moreover, immunity was granted to the witness for the usual reason—she claimed that her answers to the questions propounded would have incriminated her.

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